Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-154

PANEL:	**Mr. Antoine Frechette** **Mr. Neil Cohen** **The Honourable Mr. Armand Dureault**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**November 15 and 18, 2005**
ISSUE(S):	**1. Entitlement to further Permanent Impairment Benefits for reduction in hearing in right ear and vertigo; and** **2. Entitlement to funding for physiotherapy care provided for vertigo.**
RELEVANT SECTIONS:	**Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act), Table 12.1 of Manitoba Regulation 41/2000, and Table 4.2 of Manitoba Regulation 41/2000**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

Preliminary Matter

This appeal was heard over two (2) days on November 15, 2005 and November 18, 2005. On November 15th the City of Winnipeg was hit with a severe snowstorm and as a result one of the panel members scheduled to hear [the Appellant's] appeal, the Honourable Mr. Armand Dureault, was unable to physically attend the hearing on this day. Having been informed of this prior to the commencement of the hearing, both the Appellant and counsel for MPIC, Mr.

Morley Hoffman, agreed that Mr. Dureault could hear the appeal of November 15, 2005 via teleconferencing.

[The Appellant] was a seatbelted passenger involved in a motor vehicle accident near [text deleted] on July 24, 2000. The impact caused both airbags to deploy and the Appellant was deafened immediately and had trouble breathing. She was transported by ambulance to the [hospital #1] in [text deleted] where she was examined for her hearing and breathing complaints (as well as other minor injuries) and she was released the same day.

The Appellant's hearing in her left ear gradually returned, but not in her right ear. Her personal physician, [text deleted], referred her to [text deleted]. Hearing tests conducted by [text deleted] on September 13, 2000, October 30, 2000 and January 22, 2001 showed "*a sloping type of hearing loss of mild severity in the low and middle tones and mild to moderate severity in the high tones*." [Text deleted] referred the Appellant to [Appellant's neurotologist #1], head of the Department of Otolaryngology at the [hospital #3]. She was scheduled to see [Appellant's neurotologist #1] on April 25, 2001.

On Wednesday, April 11, 2001, the Appellant developed a severe episode of vertigo/dizziness. After three (3) days of vomiting and nausea, the Appellant sought treatment at the [hospital #2] on April 14, 2001 where she was placed on intravenous and examined. The emergency medical officer on duty diagnosed her as having benign positional vertigo. The Appellant was kept on intravenous until midnight and, after being tested with a walker, was discharged.

[Appellant's neurotologist #1] examined the Appellant on April 25, 2001 and he provided a report to [text deleted] dated April 25, 2001. In his report [Appellant's neurotologist #1] suspects

that the Appellant's hearing loss after the motor vehicle accident was caused by "a*coustic trauma due to the deployment of the air bag*". He confirms that an audiogram conducted on April 25, 2001 showed "*speech reception thresholds of 30 on the right and 15 on the left with good speech discrimination bilaterally"*. [Appellant's neurotologist #1] recommended further re-testing of her hearing in another six (6) weeks to be sure there was no improvement. As to the Appellant's dizziness, [Appellant's neurotologist #1] states:

> "*The dizziness is a different matter. There are neurological symptoms such as hemianopsia and difficulty walking which makes me suspect a cerebellar lesion. I will obtain an MRI for this. I will let you know further results when they are available*."

[Appellant's neurotologist #1] re-examined the Appellant on July 30, 2001. In his report dated July 30, 2001, [Appellant's neurotologist #1] states that the hearing tests conducted on the date of examination showed "*slightly elevated auditory thresholds on the right at 25 decibels and the left is 15*". As to the Appellant's vertigo/dizziness, [Appellant's neurotologist #1] states:

> "*She experienced a severe spell of vertigo in April and the cause of this, I suspect, was viral and not likely caused by the motor vehicle accident. It is quite possible that she is not feeling totally well since the accident and the viral illness gave her worse symptoms than she otherwise may have had. This is difficult to prove or disprove. I note that she has had a normal MRI scan. Today she feels quite good*."
> …
> "*I expect that the dizziness is related to central nervous system dysfunction. There is also the possibility that this does not cause rotatory nystagmus and the other possibility is that there is a central processing problem for vestibular information. This pattern is not likely after a viral illness, but is more likely due to the motor vehicle accident and closed head injury subsequent to that which is rather interesting.*"

On or about January 12, 2002, MPIC provided their medical consultant, [text deleted], with all the relevant medical reports and requested that he advise, amongst other things, whether the Appellant's hearing loss and vertigo problems were a direct result of the motor vehicle accident.

[MPIC's doctor], in a report to MPIC dated March 22, 2002, indicated that based on the information presented by [Appellant's neurotologist #1] and [text deleted], it was his opinion that

the Appellant's hearing loss was related to the motor vehicle accident. With respect to the Appellant's vertigo problems, [MPIC's doctor] stated that based on [Appellant's neurotologist #1's] assessment, it was his opinion that "*the motor vehicle collision is the likely proximate cause of the claimant's vertigo*." [MPIC's doctor] then recommended that new audiograms and vertigo assessments be undertaken to determine whether improvement in the Appellant's hearing and vertiginous symptoms had occurred since the assessments of [Appellant's neurotologist #1] and [text deleted].

As recommended by [MPIC's doctor], another audiogram was done on the Appellant on October 29, 2002. In a report to [text deleted] dated November 4, 2002, [Appellant's neurotologist #1] confirms that this latest audiogram showed "*a 30 decibel speech reception threshold on the right and 15 on the left*". He further indicates that the Appellant does have some residual hearing loss in her right ear and that her dizziness has cleared.

On February 18, 2003 [MPIC's doctor], after reviewing the audiogram of October 29, 2002, confirmed the permanent impairment of 0.5% assessed by the case manager for the Appellant's hearing loss. The case manager then wrote the Appellant on February 21, 2003 advising her that she was entitled to a 0.5% permanent impairment for her hearing loss in her right ear. In this letter the case manager states:

> "*Per Table 12.1 of the Manitoba Public Insurance Corporation Act, Regulation 41/00 for a reduction in hearing of 25 decibels or less you are entitled to a 0.5% of the maximum ($112 278.00) which equals $561.39.*
>
> *The calculation is as follows:*
> *0.5% x $112 278.00 = $561.39*
>
> *A cheque in the amount of $561.39 has been enclosed.*"

The Appellant applied for review of the case manager's decision. In a letter accompanying her Application For Review on April 2, 2003, the Appellant criticized [Appellant’s neurotologist #1’s] report of November 4, 2002 stating that she was seen by a resident-in-training for ten (10) minutes while [Appellant’s neurotologist #1] sat on the sideline. She also alleged that she did not get the opportunity to discuss with [Appellant’s neurotologist #1] that her vertigo occurs from time to time and that migraine headaches accompany the vertigo on occasion. The Appellant also mentioned that she had scheduled another appointment with [Appellant’s neurotologist #1] on May 12, 2003 to discuss "*how much hearing loss I suffered, the long term effects and the condition of Vertigo which come on without warning*".

After the Appellant’s appointment with [Appellant’s neurotologist #1] on May 12, 2003, the Internal Review Officer asked both [Appellant’s neurotologist #1] and [Appellant’s doctor] to provide her with further reports indicating whether or not the Appellant’s vertigo was as a result of her motor vehicle accident of July 24, 2000. She also asked [Appellant’s neurotologist #1] to indicate in his report what the Appellant’s current level of hearing loss was. [Appellant’s neurotologist #1] and [Appellant’s doctor] were both asked to provide objective medical evidence to support their opinions.

In his report dated May 30, 2003 [Appellant’s neurotologist #1] indicates that:

> “*Audiometric has been done twice. The hearing has basically stabilized with a speech reception threshold of 25 on the right and 15 on the left and 96% discrimination bilaterally. Electronystagography testing was done and is normal.*
>
> *I think that the hearing test in her right ear, which is mild, has stabilized and will not likely improve. I think that her history of airbag induced hearing loss is reasonable and consistent with the pathology and findings. Her dizziness problem is due to a viral illness as it began many months after the initial injury. I realize that she has other medical problems and in general people with other medical problems tend to have more dizziness. She has some evidence of the ear and central nervous system contributing to dizziness. My objective evidence is for the nystagmus which has been seen on her visits. It is not*

possible to fake or manufacture these findings and I am sure that these are organic. The fact that she has improved from a dizziness standpoint is consistent with the finding on the electronystagmogram of a symmetric caloric response."

In his report dated July 31, 2003 [Appellant's doctor] states that he saw the Appellant on May 3, 2001 and March 13, 2003 regarding her dizziness complaints. Describing the March 13, 2003 visit, [Appellant's doctor] states:

"*At this time she described recurrent problems of vertigo with at least two episodes occurring between November 2002 and March of 2003. Each episode would last any where from three to four days. The current episode in March of 2003 was quite severe and started when she bent over…*

In summary, the dizziness [the Appellant] is experiencing, although has yet to be given a definite diagnoses, and with the documented hearing loss as a result of the motor vehicle accident, it is possible that the dizziness is in some way related to the motor vehicle accident of 24th of July 2000. As the patient has seen [Appellant's neurotologist #1] I would suggest that you contact him for his opinion as he has seen the patient more frequently for this dizziness than I have and this is also his area of expertise."

Upon receipt of these reports, MPIC requested that [MPIC's doctor] review the reports and advise if the Appellant was entitled to any further Permanent Impairment benefits. [MPIC's doctor] was asked to pay specific attention to the reports from [Appellant's neurotologist #1] dated May 30, 2003 and [Appellant's doctor] dated July 30, 2003.

In his report to the Internal Review Officer dated September 4, 2003 [MPIC's doctor] states:

"*In his May 30, 2003 letter, [Appellant's neurotologist #1] opined that the claimant's vertigo was related to a viral illness and not the collision as he concluded previously. Based on this new information it is concluded that the previous association between the motor vehicle collision and the claimant's vertigo was erroneous; and that rather, the episode of vertigo that developed subsequent to the motor vehicle collision did not likely bear a relationship to the motor vehicle collision in question.*

In light of the aforementioned there is no ratable impairment for the reported vertigo.

With respect to the claimant's loss of hearing, a review of the June 10, 2003 audiogram was undertaken. Based on my review of this audiogram and in comparing it to Division 12 of the Revised Schedule of Permanent Impairments, the impairment award provided

> *by the Case Manager would be correct. The total permanent impairment award for partial hearing loss in the right ear would be 0.5%.*". (underlining added)

Internal Review Decision

The Internal Review Officer issued her decision on September 30, 2003. In her decision the Internal Review Officer adopted [MPIC's doctor's] opinion and confirmed that although [MPIC's doctor] had previously concluded in his report of March 21, 2002 that the motor vehicle accident was likely the proximate cause of the Appellant's vertigo (based on assessments by [Appellant's neurotologist #1]) he was now opining that the Appellant's vertigo was related to a viral illness and not the collision (based on [Appellant's neurotologist #1's] report of May 30, 2003). As to the Appellant's hearing loss, the Internal Review Officer confirmed the case manager's decision that the Appellant was entitled to an impairment rating of 0.5% based on Division 12 of Manitoba Regulation 41/2000.

Notice of Appeal of October 20, 2003

The Appellant, on October 20, 2003, filed a Notice of Appeal stating that the impairment rating of 0.5% for her hearing loss was improperly assessed and that in the three (3) years she had seen [Appellant's neurotologist #1] not once did he say that her vertigo was caused by a viral illness, but rather was due to the motor vehicle accident.

The Appellant, on her own initiative, decided to seek another medical opinion. [Appellant's doctor] referred her to [Appellant's neurotologist #2], a neurotologist with the Department of Otolaryngology at the [hospital #3]. As noted above, this Department is headed by [Appellant's neurotologist #1] (also a neurotologist) and as such, [Appellant's neurotologist #1] is

[Appellant's neurotologist #2's] superior. In his report to [Appellant's doctor] dated May 9, 2004 [Appellant's neurotologist #2] states:

> "*We think that [the Appellant's] dizziness is secondary to the trauma she suffered during the car accident. She may not have compensated very well from that episode of severe vertigo she suffered in April 2001*."

[Appellant's neurotologist #2] also informed [Appellant's doctor] that he was referring the Appellant to a vestibular physiotherapist to help her with some exercises for her balance.

On June 23, 2004 [Appellant's neurotologist #2] provided a report to the Commission's Director of Appeals, [text deleted]. Attached to this report was a copy of [Appellant's neurotologist #2's] report to [Appellant's doctor] dated May 9, 2004. In his report of June 23, 2004, [Appellant's neurotologist #2] states:

> "*I suspect that with the history of airbag deployment and audiometric findings that she has some form of damage to the inner ear mechanism or vestibular system.*
> …
> *We will be re-evaluating her post-testing and post-therapy evaluation. I should be able to have a more accurate assessment of her problem after these have been done*."

[Commission's Director of Appeals] forwarded a copy of [Appellant's neurotologist #2's] June 23, 2004 report to the Internal Review Officer. In a letter to [Commission's Director of Appeals] dated June 30, 2004 the Internal Review Officer informed [Commission's Director of Appeals] that after reviewing [Appellant's neurotologist #2's] reports her internal review decision of September 30, 2003 would remain the same. In this letter, the Internal Review Officer states:

> "*In a report dated May 9, 2004, it is written "we think that [the Appellant's] dizziness is secondary to the trauma she suffered during the care (sic) accident". However, there is no objective medical evidence to support this statement. In addition, there is no response to [Appellant's neurotologist #1's] conclusion that [the Appellant's] vertigo was related to a viral illness and not to the collision*."

As recommended by [Appellant's neurotologist #2], the Appellant attended physiotherapy treatments in June and July 2004 and invoices for these treatments were forwarded to MPIC for payment. MPIC requested that [MPIC's doctor] review the medical documentation on file to determine if the physiotherapy treatments were medically required and/or related to the motor vehicle accident and if so, was further treatment required.

In his report to the case manager dated September 21, 2004, [MPIC's doctor] states:

> "*As per my previous review of the file dated September 4, 2003 (on file as Item No. 2), the claimant's treating physician and otolaryngologist both indicated that the claimant's vertigo developed a significant time after the collision and according to [Appellant's neurotologist #1], the otolaryngologist, was related to a viral illness. Thus, the vertigo cannot be related to the motor vehicle collision in question.*
> …
> *Any further treatment for the vertigo provided to the claimant by [Appellant's vestibular physiotherapist] would also not be related to injuries sustained in the motor vehicle collision in question, in my opinion*."

The case manager wrote to the Appellant by letter dated October 18, 2004 informing her that MPIC would not fund the physiotherapy treatments as the vertigo was not as a result of the motor vehicle accident.

<u>Notice of Appeal of November 4, 2004</u>

The Appellant, on November 4, 2004, filed a Notice of Appeal stating that she had sought a second opinion regarding her vertigo/dizziness/balance problem from [Appellant's neurotologist #2] and that [Appellant's neurotologist #2] had sent a letter to the Director of Appeals ([text deleted]) on June 23, 2004. The Appellant also stated that in denying the reimbursement of the paid physiotherapy treatments MPIC only took into account [Appellant's neurotologist #1's] assessment and not the opinion of [Appellant's neurotologist #2].

Internal Review Decision

The Internal Review Officer issued her decision on November 22, 2004. After reviewing the entire medical file, the Internal Review Officer, relying on [MPIC's doctor's] reports of March September 4, 2003 and September 21, 2004, confirmed the decision of the case manager dated October 18, 2004.

Notice of Appeal of December 22, 2004

On December 22, 2004, the Appellant filed another Notice of Appeal stating that [Appellant's neurotologist #2] had performed further tests regarding her vertigo and that these results were not in MPIC's file. She also requested that [Appellant's neurotologist #1] clarify his comments in his report of May 30, 2003 that *"my other medical conditions cause my dizziness".*

On January 6, 2005 the Appellant sent letters to both [Appellant's neurotologist #1] and [Appellant's neurotologist #2]. In her letter to [Appellant's neurotologist #1], the Appellant requested that he clarify his comments found in his May 30, 2004 report that *"I have other medical problems and that people with other medical problems have more dizziness".* She noted also that at no time did [Appellant's neurotologist #1] ever express this opinion to her. In her letter to [Appellant's neurotologist #2], the Appellant requested that he provide the Commission and MPIC with the results of tests done in May and June 2004.

In a reply letter to the Appellant dated January 11, 2005, [Appellant's neurotologist #1] states:

> "*You have asked me to write another letter to you at (sic) the MPIC about your dizziness. You have indicated that you are unaware of any medical conditions, which may contribute to dizziness, and these have never been expressed to you. In fact you have indicated to me that you have migraine headaches, irritable bowel syndrome and some shoulder pains. You are taking medications for these. These may be factors in the dizziness however are probably not the main problem. I realize that you are trying to acquire more sympathetic hearing from MPIC however your dizziness began several*

> *months after the motor vehicle accident and it is not caused by the motor vehicle accident*."

In a letter to the Director of Appeals, [text deleted], dated January 14, 2005 [Appellant's neurotologist #2], after reviewing the Appellant's E.N.G. and posturography test results, states:

> "*In summary, she has quite poor and significant dysfunction established on posturography. This most likely is due to poor central compensation related to her injuries. I reinforced at her last visit the need for ongoing movement physiotherapy to help her adapt. Unfortunately, there are no other treatment options available to her. Hopefully, over time, with generalized movement and exercises, her vestibular function may improve, but we will have to see how this transpires over time*."

[Commission's Director of Appeals] forwarded [Appellant's neurotologist #2's] report of January 14, 2005 to the Internal Review Officer and on January 27, 2005, the Internal Review Officer re-affirmed her decision of September 30, 2003 stating:

> ...
> *"[Appellant's neurotologist #2] does not cite any objective medical evidence to support this statement, and there is no response to [Appellant's neurotologist #1's] conclusion that [the Appellant's] Vertigo was related to a viral illness and not the collision*."

Appeal

The appeal hearing took place over two (2) days on November 15, 2005 and November 18, 2005.

The Appellant appeared on her own behalf and MPIC was represented by Mr. Morley Hoffman.

Entitlement to further Permanent Impairment benefits (for reduction in hearing in right ear and vertigo)

The relevant legislation in respect of this appeal is Section 127 of the MPIC Act:

> **Lump sum indemnity for permanent impairment**
> 127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than $500. and not more than $100,000. for the permanent impairment.

In respect of the permanent impairment award relating to hearing loss, Schedule A, Division 12, Table 12.1 of Manitoba Regulation 41/2000 provides in part:

Table 12.1 Impairment rating for hearing loss

Reduction of Hearing in Decibels (DB)*	Impairment Rating	
	Most Impaired Ear	**Less Impaired Ear**
25 ISO or less	0.5%	2.5%
25-29 ISO	1.0%	5.0%
30-34 ISO	1.5%	7.5%
35-39 ISO	2.0%	10.0%
40-44 ISO	2.5%	12.5%
45-49 ISO	3.0%	16.0%
50-54 ISO	3.5%	17.5%
55-59 ISO	4.0%	20.0%
60 ISO or more	5.0%	25.0%

*According to the average obtained by a valid audiogram on frequencies of 500, 1000 and 2,000 cycles.

In respect of the permanent impairment award relating to the vertigo, Schedule A, Division 12, Table 4.2 of Manitoba Regulation 41/2000 provides:

4.2 Functional criteria of vestibular impairment

Class	Symptom or condition	Impairment Rating
Class 1	Peripheral or central vertigo does not affect the capacity to perform activities of daily living (ADL).	2.5%
Class 2	Peripheral or central vertigo does not affect the capacity to perform most ADL, but certain activities, such as driving an automobile or riding a bicycle, may endanger the safety of the patient or others.	7.5%
Class 3	Peripheral or central vertigo necessitating continuous supervision for the performance of most ADL such as personal hygiene, household chores, or walking.	30%
Class 4	Peripheral or central vertigo requiring continuous supervision for the performance of most ADL and requiring confinement of the patient at home or an institution.	50%

Vestibular injury may be compensated over time and should be rated at both 6 and 12 months after injury to establish whether it has become static.

The Appellant testified at this hearing and stated that:

a) just before her scheduled April 25, 2001 appointment with [Appellant's neurotologist #1] she suffered an acute episode of vertigo where, after four (4) days of not eating and vomiting while bedridden, she sought treatment at the [hospital #2];

b) she was sick for almost nine (9) months following the April 2001 vertigo attack and she thinks she saw [Appellant's neurotologist #1] three (3) or four (4) times during this period for her hearing and dizziness problems;

c) her vertigo improved during this nine (9) month period but not her balance problems;

d) at no time before 2003 did [Appellant's neurotologist #1] mention a viral illness to her;

e) [Appellant's neurotologist #2] referred her to [text deleted], [Appellant's vestibular physiotherapist], and that her last visit with [Appellant's vestibular physiotherapist] was in September 2004 at which time she was given home exercises for her balance problems;

f) although she did see an improvement with the home exercises, she still continues to have occasional dizziness attacks depending on what she is doing;

g) her job as a merchandiser in stores involves frequent changes of head position which occasionally triggers dizziness attacks;

h) there is no set pattern as to how often she is sick in any given month but guesses its between two (2) – four (4) times a month;

i) at one time she asked [Appellant's neurotologist #1] if her vertigo/dizziness problems were related to the motor vehicle accident and he responded by saying it was a possibility;

j) there are several contradictions in [Appellant's neurotologist #1's] reports:

i) in his report of April 25, 2001, [Appellant's neurotologist #1] makes no mention of a viral illness;

ii) in his report of July 30, 2001, [Appellant's neurotologist #1] states in the first paragraph that he suspects the vertigo was caused by a viral illness however in the third paragraph he states that he expects it is not viral but more likely due to the motor vehicle accident; and

iii) in his report dated May 30, 2003, [Appellant's neurotologist #1] now says her dizziness is due to viral illness.

k) there are contradictions in [MPIC's doctor's] report of March 22, 2003.

[Appellant's neurotologist #2] was called to testify on behalf of the Appellant. He stated that he first saw the Appellant in May 2004 at which time she complained of vertigo, weakness and light-headedness. He saw the Appellant several times after this with her last visit being in March 2005. [Appellant's neurotologist #2] indicated that on June 14, 2004, he referred the Appellant to [text deleted], [Appellant's vestibular physiotherapist]. In answer to a question from one of the members of the panel, [Appellant's neurotologist #2] stated that in his opinion the physiotherapy treatment was medically required.

[Appellant's neurotologist #2] testified that "*a diagnosis of vertigo is a combination of putting together multiple pieces of a large puzzle*" He stated that in this case the most likely probability is that the Appellant's vertigo/dizziness problem was caused by the deployment of the air bag at the time of the accident which resulted in pressure trauma to the inner ear mechanism. He testified that his opinion is based on the Appellant's subjective complaints, results of her audiometry tests, medical reports on file and his own physical examinations of the Appellant. [Appellant's neurotologist #2] stated that he does not agree with [Appellant's neurotologist #1]

that the Appellant's vertigo/dizziness is due to a viral illness. He indicated that audio trauma cannot damage the hearing system (as that suffered by the Appellant) without also damaging the vestibular system. Asked to interpret the apparent contradictions in [Appellant's neurotologist #1's] report of July 30, 2001, [Appellant's neurotologist #2] stated that [Appellant's neurotologist #1] appears "unsure".

Under questioning from MPIC's lawyer, [Appellant's neurotologist #2] acknowledged that a body temperature of 38.2 °C (as the Appellant apparently had when she went to the [hospital #2] for treatment for her acute vertigo attack on April 14, 2001) could be consistent with a viral infection. He also acknowledged that a viral infection can cause dizziness and nausea for 2-3 days and that individuals suffering from a condition called "labyrinthitis" could have symptoms of dizziness and nausea for a couple of years. It should be noted that the Appellant was never diagnosed with "labyrinthitis". [Appellant's neurotologist #2] further acknowledged that the length of time from the motor vehicle accident to the Appellant's presentation of vertigo (9 months) was a bit long. He stated however that he does see cases where a balance disorder presents itself after a hearing loss. [Appellant's neurotologist #2] maintained under cross-examination that although it is possible the Appellant's vertigo is due to a viral illness, on a balance of probabilities the air bag explosion caused the vertigo/balance disorder.

MPIC called [Appellant's neurotologist #1] as its witness. [Appellant's neurotologist #1] testified that he is [text deleted] considered a specialist in "dizziness", seeing anywhere from 1,000 – 1,500 patients a year. [Appellant's neurotologist #1] stated he has seen many patients with viral infections and that he often sees these patients a month after the onset of symptoms. In answer to a question by the Appellant with respect to his report of July 30, 2001, [Appellant's neurotologist #1] stated that there are no objective tests to diagnose vertigo and that such a

diagnosis is based mostly on statistics and presentation of patients. [Appellant's neurotologist #1] testified that the Appellant's body temperature of 38.2 °C at the [hospital #2] is consistent with someone who had a viral infection.

[Appellant's neurotologist #1] also testified that there are many other causes of vertigo other than viral, and he gave as an example someone who suffers a head injury. In answer to a question from one of the panel members, he acknowledged that it is possible that the "two ear system" does not have dysfunction at the same time (referring to the hearing system and the vestibular system). He added however that a vestibular injury would show up soon after the initial trauma, rather than later (as in the Appellant's case). Asked to comment on [MPIC's doctor's] interpretation of his reports of April 25, 2001 and July 30, 2001 (contained in [MPIC's doctor's] report of March 22, 2002), [Appellant's neurotologist #1] replied that [MPIC's doctor] is "justifiably confused".

[Appellant's neurotologist #1] testified that in his opinion, the Appellant's vertigo problems were caused by a viral illness and were not caused by the airbag deployment. He stated that if the vertigo was related to the accident, the latter would have started soon after the accident. He testified that the Appellant's onset of vertigo problems some nine (9) months after the motor vehicle accident does not make sense.

DISCUSSION

The facts in this case are not in dispute. On July 24, 2000, the Appellant was involved in a motor vehicle accident at which time the airbags deployed. She suffered an ear injury which resulted in a permanent partial hearing loss (the degree of the hearing loss is a matter under appeal and is addressed below). The Commission notes that both [Appellant's neurotologist #2] and

[Appellant's neurotologist #1] agree that the Appellant's hearing loss was caused by the deployment of the airbag. In April 2001 the Appellant suffered a severe vertigo episode which lasted a few days and required treatment at the [hospital #2]. The Appellant says that since this April 2001 vertigo attack, she still suffers from intermittent balance problems. Depending on what activity she is doing, these balance problems occur anywhere from two (2)– four (4) times a month.

Throughout the hearing of this matter, the Appellant presented herself in a forthright and honest manner. The Commission found the Appellant to be a credible person and the Commission accepts her evidence that since her severe episode of vertigo in April 2001, she continues to suffer from balance problems.

The issue before the Commission is "what is the probable cause of the Appellant's ongoing vertigo?" To answer this question, the Commission is faced with conflicting medical opinions from two respected specialists, [Appellant's neurotologist #2] and [Appellant's neurotologist #1]. It is important to note that both doctors testified that there <u>can</u> be a relationship between vertigo and a motor vehicle accident. Where they part ways in this case is the timing of the Appellant's vertigo attacks. (underlining added)

[Appellant's neurotologist #2] says that although the Appellant's first vertigo attack some nine (9) months after the accident could be considered a little long, late presentation of a balance disorder is possible. He also says that hearing loss could present itself before a balance disorder (as in the Appellant's case). [Appellant's neurotologist #2] is of the view that although it is

possible the Appellant's vertigo is due to a viral illness, on a balance of probabilities her vertigo is due to the air bag explosion which caused pressure trauma to the Appellant's inner ear mechanism.

[Appellant's neurotologist #1] disagreed with [Appellant's neurotologist #2]. He says that if the Appellant's vertigo was related to the motor vehicle accident, her symptoms would have presented soon after the motor vehicle accident, not nine (9) months later. He also states that although it is possible to have an ear injury (hearing loss) without a vestibular injury, the vertigo should have started soon after the accident. [Appellant's neurotologist #1] says that the Appellant's vertigo was caused by a viral illness and was not related to the motor vehicle accident.

The Commission notes that although [Appellant's neurotologist #2] and [Appellant's neurotologist #1] differ as to the cause of the Appellant's vertigo , both are in agreement that such a disorder is hard to evaluate as there are no objective tests to make a conclusive diagnosis. After considering the totality of the evidence, the Commission accepts [Appellant's neurotologist #2's] evidence over that of [Appellant's neurotologist #1]. The Commission finds that the testimony of [Appellant's neurotologist #2] is clear and consistent and provides a persuasive explanation as to the causal relationship between the motor vehicle accident and the vertigo. The Commission accepts [Appellant's neurotologist #2's] evidence that audio trauma cannot damage the hearing system without also damaging in some way the vestibular system. The Commission finds that this evidence is consistent with the undisputed fact that the Appellant's hearing was damaged by the deployment of the airbag at the time of the accident. The Commission further accepts [Appellant's neurotologist #2's] evidence that even though the Appellant's first vertigo

attack occurred some nine (9) months post accident, the most probable cause of her vertigo is not a viral illness (as opined by [Appellant's neurotologist #1]), but rather the trauma to her vestibular system caused by the deployment of air bag.

The Commission gives greater weight to [Appellant's neurotologist #2's] evidence than that of [Appellant's neurotologist #1] for the following reasons:

1. In his report dated April 25, 2001, [Appellant's neurotologist #1] failed to make a diagnosis of viral illness even though he was aware of the Appellant's severe vertigo episode two (2) weeks earlier; and
2. In his report of July 30, 2001 [Appellant's neurotologist #1] gives inconsistent evidence as to the cause of the Appellant's vertigo:

> …..
>
> "*I expect that the dizziness is related to central nervous system dysfunction. There is also the possibility that this does not cause rotatory nystagmus and the other possibility is that there is a central processing problem for vestibular information.* <u>*This pattern is not likely after a viral illness, but is more likely due to the motor vehicle accident and closed head injury subsequent to that which is rather interesting.*</u>" (underlining added)

The Commission notes that the inconsistency in [Appellant's neurotologist #1's] July 30, 2001 report is evidenced by the fact that [MPIC's doctor] relied on this report when he originally concluded in his report of March 22, 2002 that the Appellant's vertigo was related to the motor vehicle accident. It was only when [Appellant's neurotologist #1] opined in his report of May 30, 2003 that the Appellant's dizziness was due to a viral illness did [MPIC's doctor] conclude that that the Appellant's vertigo was not related to the motor vehicle accident.

In preferring [Appellant's neurotologist #2's] evidence over that of [Appellant's neurotologist #1], the Commission notes that both [Appellant's neurotologist #2] and [Appellant's neurotologist #1] acknowledged a possible relationship between vestibular damage and a motor vehicle accident. As already mentioned, where they part ways in this matter is the timing of the Appellant's vertigo attacks. The Commission is satisfied that [Appellant's neurotologist #2's] evidence has established on a balance of probabilities that there is a causal relationship between the motor vehicle accident and the vertigo. The Commission is of the view that [Appellant's neurotologist #2's] testimony corroborates that of the Appellant (which testimony, the Commission repeats, was clear and consistent). The Commission therefore finds that the Appellant has established on a balance of probabilities the causal connection between the motor vehicle injury and her vertigo.

Entitlement to further permanent Impairment award re: vertigo

At the hearing the Appellant testified that she still continues to have occasional dizziness attacks depending on what she is doing. She stated her job as a merchandiser in stores involves frequent changes of head position which occasionally triggers dizziness attacks and that although there is no set pattern as to how often these attacks occur in any given month, she estimates that she is sick between two (2) – four (4) times a month. Having regard to the schedule in Division 12, Section 4 of the Manitoba Regulation 41/2000 the Commission concludes that the Appellant's vertigo is of a moderate nature, consistent with Class 2 of the Schedule, which provides that vertigo which does "not affect the capacity to perform most activities of daily living, but certain activities, such as driving an automobile or riding a bicycle, may endanger the safety of the patient or others", falls within the impairment classification rate of 7.5%.

Entitlement to further permanent impairment award re: hearing loss

Another aspect of the Internal Review Officer's decision of September 30, 2003 under appeal and before the Commission is with respect to the Appellant's entitlement to further permanent impairment benefits for the reduction of hearing in her right ear. In her September 30, 2003 decision, the Internal Review Officer confirmed the case manager's decision that the Appellant was entitled to an impairment rating of 0.5% based on Division 12 of Manitoba Regulation 41/2000.

At the hearing [Appellant's neurotologist #1] was asked by one of the panel members to review the Appellant's audiogram of October 29, 2002, and to assess the Appellant's hearing loss having regard to Table 12.1 of Division 12 of Manitoba Regulation 41/2000. [Appellant's neurotologist #1] testified that in determining a hearing loss under Table 12.1, one must use the average obtained by a valid audiogram on frequencies of 500, 1000 and 2000 cycles. He further testified that, in his opinion, the audiogram of October 29, 2002 showed that the Appellant had a hearing loss of 40 ISO in her right ear. He stated that in his opinion the impairment rating of 0.5% determined by the case manager was erroneous and that the correct loss was between 40-44 ISO, thus translating to a permanent impairment rating of 2.5%.

[Appellant's neurotologist #1] was then asked to perform the same exercise, but this time with the Appellant's audiogram of June 14, 2004. [Appellant's neurotologist #1] testified that in his opinion, the results of this audiogram showed that the Appellant had a hearing loss of 35 ISO, thus translating to a permanent impairment rating of 2.0%.

During the course of his submission Mr. Hoffman conceded that the case manager erred when she assessed the Appellant's hearing loss in her right ear at 0.5%. He argued that the issue before the Commission was which audiogram should be used to assess the Appellant's hearing loss, the audiogram of October 29, 2002 or that of June 14, 2004. Mr. Hoffman stated that in his opinion, the results of the audiogram of June 14, 2004 should be used as they are the most recent ones. The Commission disagrees with Mr. Hoffman and finds that the audiogram of October 29, 2002 should be used as these were the results that were relied upon by the case manager when she made her initial assessment of 0.5%. It is from this assessment that the Appellant is now appealing. The Commission accepts [Appellant's neurotologist #1's] assessment of the Appellant's audiogram of October 29, 2002 and finds that the Appellant is entitled to a permanent impairment award of 2.5% for the reduction of hearing in the her right ear.

Entitlement to funding for physiotherapy care provided for vertigo

In her November 22, 2004 decision, the Internal Review Officer confirmed the case manager's decision that the Appellant was not entitled to funding for physiotherapy treatments because the vertigo was not related to her motor vehicle accident. Considering that the Commission has now determined that the Appellant's vertigo was related to her motor vehicle accident, the issue, which the Commission must now decide, is whether the Appellant's physiotherapy treatments were medically required? On this point the Commission notes that at the hearing [Appellant's neurotologist #2] was pointedly asked by one of the panel members whether, at the time he referred the Appellant to the physiotherapist, he felt the treatments were medically required. [Appellant's neurotologist #2] answered in the affirmative and the Commission accepts his evidence. The Commission thus finds that the Appellant's physiotherapy treatments were medically required. The Commission notes that the Appellant testified that her last appointment

with the physiotherapist was in September 2004 after which she was given home exercises to perform on a daily basis.

Decision

The Commission finds, for the reasons set out above that the Internal Review Officer erred in her decisions of September 30, 2003 and November 22, 2004. The Commission therefore rescinds these decisions and directs MPIC to:

1. pursuant to Division 12, Section 4 of the Manitoba Regulation 41/2000 compensate the Appellant for the permanent impairment in respect of her vertigo in the amount of 7.5%;
2. pursuant to Table 12.1 of Division 12 of Manitoba Regulation 41/2000 increase the permanent impairment awarded to the Appellant in respect of her hearing loss in her right ear to 2.5%; and
3. reimburse the Appellant for the physiotherapy treatments administered by Beth Wonneck up to September 2004.

Dated at Winnipeg this 20th day of January, 2006.

ANTOINE FRECHETTE

HONOURABLE ARMAND DUREAULT

NEIL COHEN